BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WENDY S. TRAPHAGEN	)	
Claimant	)	
	)	
VS.	)	
	)	
STATE OF KANSAS	)	
Respondent	)	Docket No. 1,049,209
	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	

ORDER

STATEMENT OF THE CASE

Respondent and the State Self-Insurance Fund (respondent) requested review of the July 25, 2012, Award entered by Administrative Law Judge Rebecca A. Sanders. The Board heard oral argument on November 16, 2012. Jan L. Fisher, of Topeka, Kansas, appeared for claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found claimant was entitled to a 30 percent permanent partial impairment to the whole body. Dr. Sushmita Veloor was authorized to provide claimant with medication and pain management. Further, the ALJ found there had been no overpayment of temporary total disability compensation.

The Board has considered the record and adopted the stipulations listed in the Award. The Board, however, notes the ALJ's record lists a preliminary hearing held August 10, 2011. The preliminary hearing was actually held July 27, 2011.

ISSUES

Respondent argues claimant did not prove she met with personal injury by accident or a series of accidents arising out of and in the course of her employment and is, therefore, not entitled to permanent partial disability compensation or future medical. Respondent further argues claimant was not entitled to temporary total disability benefits and it should be reimbursed for those payments. If the Board finds claimant was entitled to temporary total disability benefits, respondent argues those benefits should have started

no earlier than June 29, 2010, when Dr. Veloor noted claimant's main problem was her neck and shoulders. Further, in the event the Board finds claimant is entitled to permanent partial disability compensation, respondent argues Dr. Edward Prostic's percentage rating for claimant's cervical disability is not based on the AMA *Guides*[1] preferred DRE method and should not be considered.

Claimant argues the ALJ's Award should be affirmed in its entirety as she has proven she suffered personal injury by a series of accidents that arose out of and in the course of her employment. Claimant further contends Dr. Prostic's disability rating for her cervical spine is based on the AMA *Guides*.

The issues for the Board's review are:

(1) Did claimant suffer personal injury by a series of accidents that arose out of and in the course of her employment?

(2) If so, what is the nature and extent of claimant's disability?

(3) Is claimant entitled to ongoing and/or future medical?

(4) Is respondent entitled to a credit for overpayment of temporary total disability compensation?

FINDINGS OF FACT

Claimant has worked as a senior administrative assistant for the Kansas Department of Revenue for over 10 years. She spends 85 to 90 percent of her time typing. Her job also requires her to answer the telephone. Claimant testified she works from forms, which she sets to the left side of her computer. Her computer is directly in front of her. As she keys in the information from the forms onto her computer, she is turning her head to the left. When she has finished entering the information into her computer, she moves the papers from her left to the right side of her computer. She is claiming a series of accidents caused by the constant twisting and turning of her body and neck, resulting in injuries to her neck and upper extremities. She associated her conditions with the constant flipping back and forth of her head between documents and her computer monitor and from tilting her head to the side to hold the phone while typing. She would get headaches by 5 p.m. and usually by Friday she would have to take some pain medication and muscle relaxers.

In September 2009, claimant noticed her right hand and right elbow would go numb and her fingertips would tingle. In early October 2009, claimant had a large welt on her left

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

hand, and she could not move her thumb. By November 2009, she was having pain in her right and left hands, right elbow, right shoulder and neck. Claimant reported the problem to respondent, who sent her to Dr. Donald Mead on November 13, 2009. Dr. Mead gave claimant braces and restricted her typing to 30 minutes on and then 30 minutes off. He ordered that claimant have a job site assessment, which was done by St. Francis Hospital on December 9, 2009. Among other recommendations, the evaluators said claimant's desk should be raised, she should use a document holder, she should use wrist rests, and she should use a wireless headset. Dr. Mead also sent claimant to physical therapy. Dr. Mead wanted claimant to have an EMG, which was done on December 8, 2009. The EMG showed no evidence of peripheral nerve entrapment but did show findings suggestive of right-sided C-8/T1 radiculopathy.

By the time claimant next saw Dr. Mead on December 11, 2009, her left hand was feeling better but her right hand was still hurting. She also had begun having right shoulder and neck problems, but she was still more concerned about her hands. Her entire right arm would go numb. She was having neck stiffness, headaches and migraines.

Eventually Dr. Sushmita Veloor, who is board certified in physical medicine and rehabilitation, was authorized as claimant's treating physician. At some point between seeing Dr. Mead in mid-November 2009 and April 2010, when she saw Dr. Veloor, claimant's job duties went back to those she had before her restrictions. She was told her conditions were not work related so the restrictions no longer applied.

Dr. Veloor first saw claimant on April 16, 2010. Claimant primarily complained of pain in her neck and both arms, as well as some numbness. She reported the symptoms started in October 2009 and were due to the repetitious nature of her work of answering the telephone, typing and filing. Dr. Veloor's initial diagnostic impression was that claimant's neck and upper extremity pain were most likely due to cervical degenerative disc disease in combination with myofascial pain syndrome. Claimant also had findings suggestive of tendinitis along the left forearm and right elbow. Dr. Veloor attributed claimant's tendinitis to the typing activities she was performing and the reaching/filing activities. Dr. Veloor attributed claimant's neck problems and the radicular symptoms to frequent rotation and turning motions, which could aggravate degenerative changes.

Dr. Veloor took claimant off work on April 16, 2010, and ordered an MRI of claimant's cervical spine. The MRI was done April 26, 2010, and confirmed claimant had degenerative disc disease, most pronounced at C5-6. Dr. Veloor said claimant's degenerative disc disease was causing some narrowing along the foramina. She sent claimant to physical therapy and gave her some pain medications. The physical therapy helped claimant's upper extremity symptoms. But claimant continued to have ongoing neck and right shoulder pain from the cervical degenerative disc disease. Dr. Veloor next recommended a trial of epidural injections with Dr. Nicolae. Dr. Veloor eventually recommended claimant have a neurosurgical consultation. In August 2011, claimant underwent surgery performed by Dr. Adrian Jackson.

Dr. Veloor also saw claimant post-surgery. On November 10, 2011, claimant called Dr. Veloor's office asking to be seen. Claimant had been released by Dr. Jackson at maximum medical improvement on November 9, and claimant wanted to be seen by Dr. Veloor for pain management. Dr. Veloor last saw claimant on April 13, 2012, and claimant was still having some persistent neck pain. Claimant's right arm symptoms, however, had improved significantly. The range of motion in claimant's shoulder had improved. Dr. Veloor said claimant continues to have pain and needs ongoing pain management, although she does not need as much pain medication as she did before surgery.

Dr. Adrian Jackson, a board certified orthopedic surgeon, first saw claimant on December 8, 2010, for a second opinion. Claimant was complaining of neck and right arm pain, which she attributed to work-related activities. Dr. Jackson diagnosed her with cervical radiculopathy. He recommended nerve root blocks to try to isolate the levels of her neck that were involved. Dr. Jackson reviewed an MRI from November 2010, which showed claimant had three-level degeneration, most significant at the C5-6 level.

Dr. Jackson saw claimant again on May 2, 2011, when she returned to discuss treatment options. By this time, claimant was complaining of bilateral symptoms in her upper extremities, with the left side being worse than the right. Dr. Jackson reviewed an MRI done on March 28, 2011, which showed claimant had significant degenerative changes at the C5-6 level and less prominent left-sided pathology at C4-5 and C6-7.

Dr. Jackson ordered nerve root blocks above and below the C5-6 level to figure out where claimant's symptoms were coming from. After those tests, Dr. Jackson was able to isolate claimant's symptoms to two levels of her cervical spine. At that point, Dr. Jackson recommended an anterior cervical discectomy and fusion of C4 through C6, which was performed on August 16, 2011. The surgery was a mechanical procedure to get the pressure off the nerves and allow them a chance to recover. During the surgery, Dr. Jackson found bone spurs and disc material that were encroaching on the nerve roots. He said it takes years for bone spurs to form. Claimant was off work after the surgery until September 30, 2011. Dr. Jackson released claimant as being at maximum medical improvement on November 9, 2011. He did not impose any restrictions on her at that time.

Dr. Jackson said that based on the history claimant gave him at her initial evaluation, she was asymptomatic of cervical radiculopathy before October 2009. He opined that claimant's cervical condition was the result of the natural progression of her preexisting degenerative disc disease. He did not believe it was probable that claimant's work activities aggravated or accelerated her preexisting degenerative disc disease. However, he believed the work did aggravate her symptoms.

> Q. [by claimant's attorney] And so have you ever addressed specifically the question of whether the work-related accident aggravated her overall condition, whether that be simply aggravating her symptomatology versus the underlying degenerative disc disease?

> A. [by Dr. Jackson] I think based on the history that she relayed to me, which is all I can go by at that initial evaluation, was that she had some work-related incident around October of 2009 and she claimed she was asymptomatic prior to that, became symptomatic with it. So I'm not as focused on the radiographic findings as I am on the onset of the symptoms, and based on the information that she relayed to me, that was my opinion, that it was related.[2]

Dr. Edward Prostic, a board certified orthopedic surgeon, has seen claimant on three occasions. He first saw her on March 15, 2010, at the request of claimant's attorney. Claimant told him she was injured from repetitious minor trauma during the course of her employment as an administrative assistant for respondent from approximately November 13, 2009. Upon examining claimant, Dr. Prostic noted she had right periscapular tenderness as well as findings typical of a person having rotator cuff disease or a problem with the cervical area, mostly at the C4-5 level. Claimant had a positive test for carpal tunnel syndrome. Dr. Prostic tentatively diagnosed claimant with rotator cuff tendonitis of the right shoulder, thoracic outlet syndrome, right carpal tunnel syndrome, left deQuervein's tenosynovitis, and left intersection syndrome.

Dr. Prostic next saw claimant on July 13, 2011. Her complaints remained essentially the same. Dr. Prostic found positive findings of carpal tunnel syndrome only on claimant's right. In March 2010, Dr. Prostic had diagnosed claimant with deQuervein's tendonitis, intersection syndrome and rotator cuff tendonitis, but by July 2011 those symptoms had disappeared. Dr. Prostic said those conditions had improved either with time or rest. Dr. Prostic noted in his July 13, 2011, report that claimant was hyperreactive, meaning she reacted more strongly than he expected. Claimant's pain behavior was in excess of the objective findings.

Dr. Prostic saw claimant for the third time on March 19, 2012. She had undergone surgery by Dr. Jackson in August 2011. Upon examining claimant, Dr. Prostic found she had diffuse tenderness posteriorly with poor range of motion in extension and lateral to each side. She had rapidly positive flexion compression at each wrist with median nerve testing. The remainder of her physical examination was satisfactory.

Based upon Dr. Prostic's three physical examinations, claimant's history, and claimant's medical records, he diagnosed her with post-operative anterior cervical fusion and discectomy at two levels with a poor result, as well as bilateral carpal tunnel syndrome.

Dr. Prostic said if claimant had to rotate her neck into uncomfortable positions, it is reasonable such activity would aggravate her underlying degenerative disc disease. It would be significant that she did that repetitively for years. Dr. Prostic believes claimant's bilateral carpal tunnel syndrome was caused by the repetitious keying she did and by the

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[2] Jackson Depo. at 16-17.

C6 radiculopathy for which she was operated. He recommended she have an EMG and if positive for carpal tunnel syndrome, she be offered decompressive surgery.

Dr. Prostic said each time a person rotates the neck, the space in the neuroforamin is decreased. Presumably that is what injured claimant's C6 nerve. He agreed, however, that rotating the neck only causes a temporary reduction in the space and when the neck is returned to a neutral position, the previous space is there. Dr. Prostic said presumably in claimant's case, some swelling of the nerve made it symptomatic.

Dr. Prostic said if claimant receives no further treatment in regards to bilateral carpal tunnel syndrome, he would consider her medically stable. Using the AMA *Guides*, Dr. Prostic rated claimant as having a 20 percent permanent partial impairment to the whole body for her cervical spine, consisting of 11 percent impairment for the two-level discectomy and fusion and 9 percent for loss of motion. Dr. Prostic also rated claimant as having a 10 percent impairment for each upper extremity based on his diagnosis of bilateral carpal tunnel syndrome. Combining the ratings would calculate to a rating of 30 percent to the body as a whole.

Dr. Christopher Fevurly is board certified in internal medicine and preventive medicine with a specialization in occupational medicine. He examined claimant on June 15, 2010, at the request of respondent. Claimant told Dr. Fevurly her problem was initially primarily in her wrists and hands and then, within two months of onset, from early October 2009 to mid-December 2009, the symptoms were predominantly in the neck and upper back. During that period of time, claimant had modifications of her duty, which Dr. Fevurly said may have been the most contributing factor to the resolution of her wrist and hand complaints.

Claimant complained to Dr. Fevurly of neck and upper back pain, which was aggravated by repetitive activity such as vacuuming, dishes, lifting or attempting sleep. She also noted pain when she drove. Claimant also complained of pain, numbness and tingling into the bilateral distal upper extremities and pain over the right lateral elbow. She also said she had significant pain in her bilateral shoulders, right greater than left, and had difficulty forward reaching and overhead reaching with her right arm.

In examining claimant, Dr. Fevurly found her to have exaggerated pain behaviors. She had marked limitations in range of motion of her neck and right shoulder and profound pain behaviors with attempted range of motion of the neck, right shoulder, with forward reach of the right arm, and overhead reach with the right arm. She had give-away weakness throughout the right upper extremity that did not seem to fit a myotome or dermatome. Dr. Fevurly believed there was a component of symptom magnification in claimant's presentation. Claimant's neurological examination was relatively normal. His overall assessment was that claimant had pain in her neck, right upper back and right shoulder, the causes of which were undetermined.

Dr. Fevurly said his examination of claimant was not consistent with a cervical radiculopathy. His review of claimant's 2009 EMG showed it was within normal limits for peripheral nerve entrapment. Dr. Fevurly acknowledged that Dr. Welch reported claimant's 2010 EMG showed mild right ulnar entrapment. Dr. Fevurly said that nerve conduction velocities change from day to day. Although Dr. Welch found mild right ulnar nerve entrapment, Dr. Fevurly did not believe claimant had any symptoms in the ulnar nerve distribution when he saw her. Dr. Fevurly was skeptical that surgery benefitted claimant, but he had no knowledge of that. Dr. Fevurly stated fusing cervical discs for radiculopathy will benefit arm pain, but fusing cervical discs does not benefit neck pain.

Dr. Fevurly diagnosed claimant with cervical thoracic myofascial pain or regional pain without evidence of neurogenic compromise. As for claimant's shoulder condition, Dr. Fevurly said it was unclear to him whether claimant had some type of an impingement in the right shoulder. Dr. Fevurly opined the symptoms emanating from claimant's neck and shoulders were not the result of the alleged cumulative trauma she suffered from her job duties. He had no objective reason to place permanent limitations or restrictions on claimant for her overuse syndrome.

Claimant's job site assessment indicated claimant performed constant twisting of her upper body, turning of her head and neck to the left, and neck flexion to visualize documents. Dr. Fevurly commented those movements would be expected in virtually any type of duty; most office workers will have to be able to turn their heads to look around. He agreed claimant could have had some musculoskeletal tightness from leaning over her desk because it was too low. He believed claimant had a muscular or ligamentous type of pain. He did not believe claimant's degenerative disc disease was the source of her neck pain and he did not believe she had radiculopathy when he saw her. Dr. Fevurly did not believe that the swelling from a strain or sprain would affect the amount of space available for a nerve root to exit. He believed claimant's surgery was directed to the disc osteophyte complex, and the surrounding musculature had little to nothing to contribute to the amount of impingement at the nerve root.

Dr. Fevurly said claimant's testimony that the surgery improved her headaches, the numbness in her arms and the soreness in her shoulder blade reconfirms what he expected would be the result of surgical intervention. But he noted claimant still reports her symptoms recur with tightness in her neck and shoulder blades and her arms continue to go numb when she performs her job duties of data entry. Dr. Fevurly opined the surgery really did not resolve her complaints and she still has the same symptoms, which he believes are the result of overuse phenomenon or regional pain. Dr. Fevurly said the MRI did not disclose any acute injury to the neck. He said it showed her disc osteophyte complexes, which were degenerative changes. He said the bony spurring occurred over a many-year period of time. In his opinion, claimant's employment did not cause any physical change or lesion to her neck.

Dr. Fevurly said Dr. Prostic's findings were similar to his in that he described tenderness in claimant's neck and upper back and pain upon movement of the shoulder, which he interpreted as being consistent with thoracic outlet syndrome and right rotator cuff tendinitis, but Dr. Prostic did not report findings of cervical radiculopathy or myelopathy.

Claimant testified that this injury is primarily to her neck. The problems that led to her decision to have surgery were headaches. She said it felt like her spine was squashed and her shoulder blades were burning. She had numbness down her arms and her fingers would tingle. The medication she took prior to the surgery alleviated only about 50 percent of her pain. Claimant has had an improvement in her cervical symptoms after her surgery. She very seldom has a headache. She no longer has numbness in her arms.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[3] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[4]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which

[3] K.S.A. 2009 Supp. 44-501(a).

[4] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> the accident occurred and means the injury happened while the worker was at work in the employer's service.[5]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[6] The test is not whether the accident causes the condition but whether the accident aggravates or accelerates the condition.[7] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[8]

ANALYSIS

Claimant alleges bilateral upper extremity and neck injuries from repetitive trauma. She also suffers from headaches. Her job consists primarily of doing data entry, using a keyboard and mouse, and answering the telephone. Her job also requires frequent twisting and turning of her head and body and reaching and grasping with her hands and arms.[9] Claimant was diagnosed with degenerative cervicothoracic disc disease, for which she underwent surgery. This condition preexisted her series of accidents but was aggravated by her job activities. In addition to cervical radiculopathy, claimant has been diagnosed with myofascial pain syndrome; tendinitis in the left forearm, right shoulder and right elbow; rotator cuff disease in the right shoulder; thoracic outlet syndrome; bilateral carpal tunnel syndrome; and left deQuervein's tenosynovitis and intersection syndrome. Some of the right shoulder pathology was likely due to the cervical radiculopathy. On the issues of diagnosis and causation, the ALJ found the expert medical opinions of Drs. Jackson, Veloor and Prostic to be more credible than those of Dr. Fevurly. The Board agrees.

Based on the rating opinion of Dr. Prostic, the ALJ found claimant's permanent impairment of function to be 30 percent to the body as a whole. The Board likewise finds Dr. Prostic's rating credible. Temporary total disability compensation was paid for 76 weeks. This was for the period of April 16, 2010, through September 29, 2011. Respondent argues there was an overpayment of temporary total disability compensation because the cervical condition was not work related. The Board, like the ALJ, finds the

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[5] *Id.* at 278.

[6] *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 589, 257 P.3d 255 (2011); *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[7] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997); *Claphan v. Great Bend Manor*, 5 Kan. App. 2d 47, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980).

[8] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[9] Claimant's repetitive twisting, turning and keyboarding would qualify as constant, which is two-thirds or more of the working day. See P.H. Trans. (Sept. 1, 2010), Ex. 1.

cervical condition was aggravated by claimant's work. Claimant was taken off work by Dr. Veloor, an authorized treating physician, on April 16, 2010. Claimant returned to work on September 30, 2011, after her surgery by Dr. Jackson. Dr. Jackson determined claimant to be at maximum medical improvement and released her on November 9, 2011. There was no overpayment of temporary total disability compensation. The Board adopts the findings and conclusions of the ALJ set forth in her Award, including that claimant is entitled to ongoing medical treatment to monitor her medications and provide pain management.

CONCLUSION

(1) Claimant suffered personal injury by a series of accidents arising out of and in the course of her employment with respondent.

(2) As a result of her work-related injuries, claimant has a 30 percent permanent partial disability on a functional basis.

(3) Claimant is entitled to ongoing and future medical treatment.

(4) There was no overpayment of temporary total disability compensation.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca A. Sanders dated July 25, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

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BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

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